U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF 97-10Q-B-S- LLC

DATE: JULY 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a specialty foods grocery store, seeks to permanently employ the Beneficiary in the United States as a director of purchasing. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on February 24, 2016. The Director determined that the Petitioner had not established that the Beneficiary possessed an advanced degree, as required by the statute. The Director also determined that the Petitioner had not established its ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner asserts that it has established its ability to pay the proffered wage based on assets available from its claimed parent company, plus the available balance in its bank account. The Petitioner further asserts that it has submitted sufficient evidence to establish that the Beneficiary satisfies the educational and employment experience requirements of the job offer. Upon *de novo* review, we will dismiss the appeal.

I. CASE HISTORY

A. The Employment-Based Immigrant Visa Process

The employment-based immigrant visa process consists of three parts. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656, *et seq.* The employer initiates its request for a labor certification by filing an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with DOL. The labor certification sets forth: the position's job duties; the position's education, experience, and other special requirements; the required wage; and the position's work location(s). In addition, as part of the labor certification, a beneficiary attests to his or her education and experience. The date the labor certification is filed becomes the "priority date" for the immigrant visa petition. 8 C.F.R. § 204.5(d). The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Its approval of the labor certification affirms that, "there

are not sufficient [U.S.] workers who are able, willing qualified" to perform the offered position where the beneficiary will be employed, and that the employment of the beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The labor certification is valid for 180 days from the date of its approval by DOL.

In the second step of the process, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with United States Citizenship and Immigration Services (USCIS) within the 180-day validity period. *See* 20 C.F.R. § 656.30(b)(1), 8 C.F.R. § 204.5. The agency then examines whether a petitioner can establish its ability to pay the proffered wage; whether the education and/or experience required for the offered position matches that required by the visa classification; and whether a beneficiary has the required education, training, and experience for the offered position. *See* section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2); 8 C.F.R. §204.5.

B. The Petition and Labor Certification

The petition is accompanied by a labor certification, approved by the DOL. The priority date of the petition is June 19, 2014.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4.	Education: minimum level required: Bachelor's degree.
. . .	
H.4-B.	Major field of study: Business management or administration.
. . .	
H.6.	Is experience in the job offered required for the job? Yes, 60 months.
H.7.	Is there an alternate field of study that is acceptable? Yes, any field.
H.8.	Is there an alternate combination of education and experience that is acceptable? No.
H.9.	Is a foreign educational equivalent acceptable? Yes.
H.10.	Is experience in an alternate occupation acceptable? Yes, 60 months.
. . .	
H.10-B.	Identify the job title of the acceptable alternate occupation: Business operations or retail/wholesale manager.
. . .	
H.14.	Specific skills or other requirements: 1. Strong time management and planning skills required to coordinate and prioritize multiple projects simultaneously while adapting to changes in business requirements in a fast-paced environment. 2. Strong negotiation skills. 3. Superb communications skills. 4. Ability to work collaboratively with internal and external constituents. 5. Demonstrated ability to analyze information, situations, problems, policies and procedures to formulate

> logical and objective decisions. 6. Demonstrated high level of proficiency in the Microsoft suite of productivity applications such as Word, Excel, PowerPoint, and Outlook. 7. Travel to CIS countries on as needed basis. 8. 5 years progressive work experience managing purchasing & sourcing operations in non-governmental organization; and, 9. 2-3 years of most recent business experience with CIS vendors and suppliers.

On the labor certification, the Beneficiary listed her qualifying education for the position as a bachelor's degree in business administration from completed in 2007. The Petitioner submitted a copy of the Beneficiary's diploma from the and copies of the Beneficiary's academic transcript reflecting study from 2003 until 2007. These copies were accompanied by English translations of the documents. The Beneficiary listed work as a fashion model for in NY, from July 15, 2011, through June 18, 2014; and work as director of purchasing for in Ukraine, from September 5, 2005, through December 7, 2010. The Petitioner submitted an October 24, 2013, employment letter from who identified herself as director of the and who stated that the Beneficiary worked for her in Ukraine, from September 5, 2005, through December 7, 2010.

II. LAW AND ANALYSIS

A. Advanced Degree Requirements for the Requested Classification

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers,

> physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least 5 years of progressive experience in the specialty.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

In the instant case, the Petitioner claims that the Beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's accompanied by at least 5 years of experience in the specialty. In his July 22, 2015, notice of intent to deny (NOID), the Director noted that the regulation at 8 C.F.R. § 204.5(k)(3)(i) states that in order for a Beneficiary with only a bachelor's degree to qualify as an advanced degree professional, the degree must be accompanied by at least 5 years of progressive post-baccalaureate experience in the specialty. As the Beneficiary's bachelor's degree diploma was issued on June 20, 2007, only employment experience obtained after that date can be considered "post-baccalaureate experience." Here, the Beneficiary has claimed only 29 months of post-baccalaureate experience since June 21, 2007, which is less than the 60 months required by regulation and by the terms of the labor certification.

After reviewing all of the evidence in the record, it is concluded that the Petitioner did not establish that the Beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least 5 years of progressive experience in the specialty. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

B. The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As detailed above, the labor certification states that candidates must possess a bachelor's degree or foreign equivalent plus 60 months of experience in the offered position or in the alternative positions of business operations or retail/wholesale manager. The Beneficiary claimed to have worked full time as director of purchasing for in Ukraine, from September 5, 2005, through December 7, 2010.

The Director's NOID noted that the dates of the Beneficiary's claimed full time employment in Ukraine, overlapped with the dates of the Beneficiary's claimed full time studies away in In response to the NOID, the Petitioner submitted a copy of a letter from attesting to the Beneficiary's work as a purchasing manager from September 5, 2005, through December 7, 2010. The letter states that the Beneficiary worked full time with "while she was attending the satellite location of in " The letter states that the business only keeps employment and tax records for 3 years.

The petitioner must resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The letter submitted by the Petitioner in response to the NOID is not corroborated by any independent evidence verifying the existence of a "satellite location of in ' Furthermore, the author of the letter does not explain how she is able to testify to the Beneficiary's claimed employment there if the company does not retain employment records. Finally, we note that the October 24, 2013, employment letter states that the company official is named ' while the new employment letter misspells both the first and last name of the company official as '

The evidence submitted by the Petitioner to explain the discrepancy does not resolve the inconsistency in the record with competent, objective evidence. *See Ho* at 591-592. Further, the evidence submitted contradicts other evidence submitted from the same affiant, as detailed above. Therefore, the Petitioner has not overcome the inconsistency noted by the Director and has not established that the Beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

C. Ability to Pay the Proffered Wage

Also at issue in this case is whether the Petitioner has established the ability to pay the proffered wage as of the priority date and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall*, 144-145. In this case, according to USCIS records, the Petitioner has filed Form I-140 petitions on behalf of three other beneficiaries in addition to the current Beneficiary. Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition.

On the petition, the Petitioner claimed to have been established in 2012, to have a gross annual income of $9 million, and to currently employ over 66 workers. The wage proffered to the Beneficiary is $173,971. The Petitioner did not claim to have employed the Beneficiary. The priority date in this case is June 19, 2014.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the Petitioner's net income. As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Here, the Petitioner did not submit copies of its annual reports, federal tax returns, or audited financial statements for any period since the June 2014 priority date.

[1]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and

In response to the NOID, the Petitioner submitted bank statements from 2014. The Petitioner's reliance on the balances in its bank account, however, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2), which was specifically requested in the NOID, has not been provided or why it would be inapplicable or otherwise paints an inaccurate financial picture of the Petitioner. Second, these bank statements show only the amounts in the account on given dates, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the Petitioner's bank statements somehow reflect additional available funds that would not be reflected on its tax return(s), such as the Petitioner's business income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the Petitioner's net current assets if the Petitioner had submitted copies of its tax returns.

Also in response to the NOID, the Petitioner submitted copies of balance sheets for 2014. However, reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The Petitioner asserted that it is a subsidiary of and that it is entitled by agreement to the parent company's assets to pay the proffered wage. The Petitioner referred to the claimed parent company's 2013 IRS Form 1120S income tax return; however, that tax return does not reflect the company's ownership of the Petitioner. Rather, it shows that the claimed parent owns a company named , with a different Employer's Identification Number (EIN) than the Petitioner, as well as five other companies whose names and EIN's do not match the Petitioner's. The website maintained by the New York Department of State, Division of Corporations, State Records & UCC[2] confirms that and are separate and distinct business entities. The Petitioner indicated at Schedule B, Line 3a of its 2013 IRS Form 1065, U.S. Return of Partnership Income, that no corporation owned an interest of 50% or more. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Since the Petitioner has established no legal relationship between itself and

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accrued expenses (such as taxes and salaries). *Id.* at 118.

[2] Department of State, Division of Corporations, State Records & UCC http://www.dos.ny.gov/corps/bus_entity_search.html.

the financial assets of the latter cannot be considered in determining the Petitioner's ability to pay the proffered wage.

USCIS may consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. However, unlike the petitioner in *Sonegawa*, the current Petitioner has been in business less than 5 years, has not established a historical growth in its business, and has not claimed any uncharacteristic expenses since the priority date. The Petitioner here has submitted a tax return for only a single year, which ended before the priority date and has offered no explanation for not providing the regulatory-specified documentation of its net income and net current assets since the priority date, despite the Director's specific request for that documentation in the NOID. The Petitioner stated in response to the NOID that it had applied for a 6-month extension to file its 2014 return and stated that its 2014 income tax return would be available "on or after September 15th, 2015." However, the return was not provided with the appeal, which was filed on March 7, 2016.

In the instant case, the record does not include the Petitioner's 2014 or 2015 federal tax return, audited financial statement, or annual report as required by 8 C.F.R. § 204.5(g)(2). While we may consider other factors similar to *Sonegawa*, nothing exempts the Petitioner from submitting evidence required by regulation. The evidence submitted does not establish that the Petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

D. The *Bona Fides* of the Job Offer

In addition to the deficiencies noted by the Director, we independently note that the Petitioner has not established that the petition is supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record that the Beneficiary has a personal relationship with one of the partners in the petitioning business. Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

The Petitioner explained in response to the NOID that the Beneficiary "has absolutely no ownership interest whatsoever in . . . the petitioning company . . . there is no familial relationship whatsoever between any of the owners, stockholders, partners, corporate officers, incorporators, and [the Beneficiary.] She is not the parent, child, sibling, grandchild, grandparent, cousin, or aunt to of any owner, stockholder, partner, corporate officer, or incorporator of [the Petitioner]." However, the Petitioner admitted that "she can be said to have a 'non-familial' relationship with him. Specifically, she is [the partner's] girlfriend." A relationship invalidating a *bona fide* job offer may also arise

where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

When considering a bona fide job offer, the DOL must determine whether the job is subject to the beneficiary's influence and control, and the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the DOL regulations governing labor certification.

The regulation issue at 20 C.F.R. § 656.17(l) states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
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> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
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> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
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> (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The record does not include sufficient evidence as noted in 20 C.F.R. § 656.17(l). These factors must be examined in any further proceedings. The Petitioner must submit evidence as noted above, as well as evidence of its test of the labor market demonstrating that the job opportunity was available to qualified U.S. workers.

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the Petitioner has not established that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

III. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary qualifies for classification as an advanced degree professional under section 203(b)(2) of the Act. In addition, the Petitioner did not establish that the Beneficiary possesses the minimum employment experience required by the labor certification. Further, the Petitioner did not establish its ability to pay the proffered wage. Finally, the Petitioner did not establish that the petition is supported by a *bona fide* job offer.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of 97-10Q-B-S- LLC*, ID# 18315 (AAO July 22, 2016)